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NO. 84-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAVIER FLORES,

Petitioner

V.

SOUTHERN PACIFIC TRANSPORTATION CO., ET AL.

Respondent

On Petition For Writ of Certiorari
To the Supreme Court of Texas

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

To The Honorable Chief Justice and The Associate Justices of The Supreme Court:

Respondent, Estate of H. H. Coffield, Deceased, and Estate of Charles H. Coffield, Deceased, doing business as Coffield Warehouse Company, hereinafter designated "Coffield", respectfully submits this, its Brief in Opposition to Petitioner's Petition for Writ of Certiorari and respectfully prays that the Court deny issuance of the writ.

JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1257(3), but Respondent submits that there are no "special and important reasons," as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

STATUTE INVOLVED

45 U.S.C. § 51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

This suit arises out of personal injuries that Javier Flores sustained on February 17, 1981 while employed by Coffield. Flores was hired as a welder and was injured when a Coffield engine backed into two railcars while he was attempting to cross between them. At the time of the accident, Flores was not operating or working on railcars, engines or tracks.

Coffield was a subscriber under the Texas worker's compensation law and Flores, with the help of his attorneys, Brown & Haden, made a claim for compensation under that statute. He began receiving $266.00 in weekly compensation benefits about two weeks after the accident. While receiving these benefits, Flores brought this action against Coffield under the Federal Employer's Liability Act to receive a more advantageous remedy.

Coffield is in the business of grain storage and general merchandise warehousing. It operates grain storage facilities and warehouses in two locations: one at 15 Japhet Street, Houston where the accident occurred, and one at Orr, Texas. The Houston warehousing facility is served by the Southern Pacific Transportation Company since this is the only railroad company with a spur track to the facility. The Orr grain facility is only served by the Burlington Northern Railroad Company. These are the only two railroads which deliver and remove shipments from these facilities. Grain arrives at both facilities by truck and rail and leaves the Houston facility by truck, rail and barge. Grain leaves the Orr facility by truck and rail. Coffield owns no trucks or barges for movement of grain or goods for shippers. Most of the grain and goods leave by truck or barge.

Rail shipments are brought to the Houston Coffield facility by Southern Pacific. These cars are then moved short distances by Coffield employees, using Coffield equipment, incident to the unloading process at its facility. Coffield's operations include the unloading and storage of grain and other inanimate

cargo. Coffield owns track and engines and employs people to operate this equipment. The maintenance of Coffield equipment is either done by Coffield employees or a private business, but not by Southern Pacific. All loading and unloading is accomplished by Coffield employees with Coffield equipment. Southern Pacific, as a common carrier, delivers and picks up railcars from a siding track within the Coffield premises.

The services performed by Coffield are not a part of the total rail service contracted for by the public. The shipper does not receive the services of Coffield by virtue of shipment with Southern Pacific. The regular line-haul rate entitles the owner only to transportation to the appropriate siding. Coffield hauls goods to and from its siding in order to, and only to, benefit the company's warehousing service. Coffield does not move goods for the public generally, it only transports goods which a person has contracted to store with Coffield. Independent arrangements must be made with Coffield and an additional charge paid in order to have goods stored. Moving and unloading shipments is incidental to Coffield's storage operations.

Coffield does not move the goods of any other company, nor does any other company maintain rail facilities within Coffield's premises. Coffield does not charge a fee for the movement of railcars incident to unloading. It charges a fixed rate for the elevation of grain or storage of freight, regardless of whether those goods arrive by rail or truck or leave by rail, truck or water. For shipments leaving Coffield the procedure is similar to arriving shipments. Coffield owns no stock or other financial interest in Southern Pacific, and receives no remuneration from that company.

The sole issue being presented by Petitioner to this Court involves application of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 to a fact pattern never previously held to be within the scope of that legislation.

SUMMARY OF ARGUMENT

This honorable Court has held that the right to define a "common carrier by railroad" is a legislative right. This Court's interpretation of that definition has uniformly established that those similarly situated as Coffield are not common carriers by railroad.

Further, a state court must follow the precedent of this Court and guide itself by Congressional intent when applying a federal statute to a particular set of facts. The 157th Judicial District Court of Harris County, Texas, the Court of Appeals for the Sixth Supreme Judicial District of Texas, and the Texas Supreme Court have done exactly that as concerns 45 U.S.C. § 51, and therefore the Petition for Writ of Certiorari should be denied.

ARGUMENT

Petitioner alleges that the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1972), [hereinafter FELA], is applicable. Section 51 provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . ."

This cause should not be reviewed by the Supreme Court of the United States because the Texas court of last resort did not decide an important question of federal law in a way that conflicts with decisions of this Court, any federal court of appeals or any other state's court of last resort. In fact, the decision reached by the Texas Supreme Court, by its refusal to grant a writ of error, was the only decision that it could arrive at in keeping with this Court's holding in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920), as well as numerous federal court decisions.

This Court has consistently construed the phrase "common carrier by railroad" narrowly to mean "one who operates a railroad as a means for carrying for the public—that is to say, a railroad company acting as a common carrier." *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920). This narrow interpretation of the FELA was reaffirmed in *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). In that case, a Pacific Fruit employee was injured while transporting ice to refrigerator cars for carriage by rail. He charged that Pacific Fruit was a common carrier by rail because it owned railcars, switching tracks, and the equipment to make repairs on these cars.

This Court and other federal courts have correctly declined to judicially broaden FELA's coverage to include employees of "quasi-railroads" many times in the past. In *Edwards*, this Court specifically noted that, subsequent to *Wells Fargo*, Congress substantially amended the FELA, yet, in doing so, expressly declined to adopt an amendment which would have broadened the meaning of "common carrier by railroad" to cover "activities and facilities intimately associated with the business of common carrier by railroad." *Id.* at 541. In the seventeen years since *Edwards*, Congress has continued to decline to broaden the scope of the FELA.

The *Edwards* Court noted the plaintiff's desire to bring his action under the more advantageous FELA, as opposed to the state worker's compensation act; however, cautioned future plaintiffs not to look to the courts to provide them a more advantageous remedy. In doing so, this Court stated:

> ". . . . The question of whether employees shall rely on state compensation or on the Federal Employers Liability Act is a pure question of legislative policy . . . . Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress." *Id.* at 543.

In *Aho v. Erie Mining Co.*, 466 F.2d 539 (8th Cir. 1972), the plaintiff attempted to bring an FELA lawsuit against a

mining company which operated 76 miles of rail line in conjunction with its mining operations. The court of appeals held that Erie was not a FELA common carrier by rail, and in doing so discussed the distinction between providing a railroad employee on a line, such as the Erie, with the same benefits as one working for a common carrier.

> ". . . . This is, however, a legislative and not a judicial distinction. Congress chose to limit coverage (and hence jurisdiction) to employees of common carriers, and we are not at liberty to expand such coverage beyond the common law standards contemplated and made applicable by Congress." *Id.* at 541.

For all of the foregoing reasons, this Court should decline to expand the coverage of the FELA as is has several times in the past.

Only a "common carrier by railroad" is liable under the FELA for injuries sustained by its employees in the course of their employment. The distinction which separates common carriers from others who own and operate rail facilities is whether the railroad operator holds itself out as willing to carry for the public, generally, for a price. *Mahfood v. Continental Grain Co.*, 718 F.2d 779 (5th Cir. 1983); *Aho v. Erie Mining Co., supra; Pickney v. Oro Dam Constructors*, 441 F.2d 806 (9th Cir. 1971); *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1968); *Kelly v. Pennsylvania Railroad*, 110 F. Supp. 4 (E.D. Pa. 1953), *aff'd per curiam*, 204 F.2d 692 (3d Cir. 1953), *cert. denied*, 346 U.S. 886 (1953); *Duffy v. Armco Steel Corp.*, 225 F. Supp. 737 (W.D. Pa. 1964).

The mere existence of an intraplant rail facility will not make a company a "common carrier by railroad" under the FELA, unless the company operates its intraplant railroad facility as a means for carrying goods for hire for the general public. In *Kelly v. Pennsylvania Railroad, supra*, General

Electric operated an intraplant rail facility, which included over two miles of track, switch engines and specially constructed cars for the transportation of its products. General Electric's internal tracks were connected to a main line of the Pennsylvania Railroad. The company's products were delivered by the Pennsylvania Railroad to a siding where the company's products were removed and the cars returned to the Pennsylvania Railroad to complete further delivery to other companies.

While General Electric operated an extensive railroad facility, it was held not to be a common carrier under the Third Circuit's often quoted standard:

> "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, *offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently*, and hence is regarded in some respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed . . . ." *Id.* at 6. (Emphasis added).

General Electric's rail facility was used solely to aid its plant operations; it was not available for public transportation purposes. Therefore, General Electric was not an FELA common carrier by railroad.

The Fifth Circuit followed a similar analysis in determining whether a steel company's intraplant rail facility was operated as a "common carrier by railroad." Judge Gewin set out four considerations for determining common carrier status in *Lone Star Steel Co. v. McGee, supra*:

> ". . . [V]arious considerations are of prime importance in determining whether a particular entity is a

common carrier. First, actual performance of rail service, second, the service being performed as part of the total rail service contracted for by a member of the public, third, the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth, remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. . . ." *Id.* at 647.

Lone Star represents a rare exception in holding that this steel company operated its intraplant rail facility so as to become a FELA common carrier by railroad. In comparing the railroad operations described in the other cases cited in this brief, and the instant case, with those of *Lone Star*, important differences can immediately be found which are unique to *Lone Star*.

Besides owning a huge intraplant rail facility, Lone Star allowed various industries to maintain facilities within its plant area. Lone Star engaged in the regular shuttling of the goods of these other industries located within its plant. Thus, it performed a part of the rail service which T&N Railway had obligated itself to perform. Lone Star was, for all practical purposes, the sole owner of T&N. Based on this common ownership, the court found that Lone Star was receiving remuneration in the form of dividends from T&N for the intraplant movements being made for various other industries. Under the following operative facts, the considerations set out by the court were met.

1. Lone Star maintained a complex system of track covering several miles.

2. The company owned eight diesel locomotives, 94 railcars, and six railroad cranes.

3. It took 57 employees to operate these facilities.
4. Lone Star owned extensive property within which it operated its main plant.
5. Various industries maintained facilities within the Lone Star plant area, and their operations were integrated with the overall operation of Lone Star.
6. Over a ten year period, some fourteen independent entities maintained facilities within the plant and seven of those shipped or received commodities by rail.
7. Three subcontractors engaged in construction work for Lone Star received some materials by rail.
8. Sixty-six prime contractors who furnished their own labor, materials and equipment received their supplies, in part, by rail.
9. The plant railroad was connected to the T&N.
10. Lone Star owned all but five shares of T&N's common stock and in ten years received over two million dollars in dividends.
11. T&N is obligated to deliver railcars to each consignee's siding.
12. T&N charged for rail service involved in picking up and delivering cars to a particular industry, whether T&N handled the entire rail movements or Lone Star provided a portion of such movement.

All of the above facts influenced the court in finding that Lone Star was a common carrier by railroad; however, the case actually turned on two crucial facts:

1. Lone Star regularly shuttled the goods of other industries located within its plant facility.
2. Lone Star was virtually the sole owner of the T&N Railway which serviced Lone Star's plant and the other industries located within that plant.

The court clearly distinguished between Lone Star common carriers and private carriers such as Coffield in footnote 4 on page 645:

> "The following quote from *Ward Transport, Inc., et al. v. Public Utilities Comm.*, 151 Colo. 76, 376 P.2d 166, 169 (1962) aptly differentiates private carriers from common carriers:
>
> > '* * * a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire. He carries only for persons with whom he has an initial contract, and assumes no obligation to carry for others; and in this lies the chief distinction between a private carrier and a common carrier * * *.'"

Subsequently, the Fifth Circuit found that the Harris County Houston Ship Channel Navigation District, while it owned railroad facilities, was not a common carrier by railroad. *McCrea v. Harris County Houston Ship Channel Navigation District*, 423 F.2d 605 (5th Cir. 1970), *cert. denied*, 400 U.S. 927 (1970). Again, Judge Gewin wrote the opinion. McCrea, an employee of the Navigation District, was killed when he fell into a concrete pit housing a mechanism used by the Navigation District to unload grain from railcars. The Navigation District operated terminal facilities at the Port of Houston which were linked with various rail carriers by a belt railroad operated by the Port Terminal Railroad. The Port Terminal was an unincorporated association consisting of various rail carriers and the Navigation District. The Port Terminal leased property from the Navigation District, including rights of way, trackage, switches, yards, and office buildings.

The court dismissed the FELA action because the Navigation District was not a common carrier by rail under the Lone Star considerations and stated at pages 608-09:

> "In *Lone Star*, the steel company admitted that it performed rail services and the case turned on the last three considerations set out above. *In the instant case, whether or not the Navigation District's activities constitute rail services is of central importance.* In answering this question in the negative, the district court analogized the situation to three cases in which the courts have held that the intraplant movement of goods by rail did not make the industries involved rail carriers under FELA. More importantly, the court noted that the unloading of inanimate cargo is not ordinarily a railroad function. Thus, the court reasoned that the movement of rail cars over a few hundred feet of track, incident to the unloading process at the Navigation District's facilities, is not a rail service. While the Navigation District may be a common carrier of a type, and engaged in interstate commerce, its carriage services are performed by conveyor and not by rail.
>
> "While this determination forecloses appellant's claim that the Navigation District is a rail carrier under FELA, consideration of the remaining Lone Star criteria reinforces the result reached by the district court. The services performed by the Navigation District are not a part of the total rail service contracted for by the public. The Kansas grain shipper, who appeared hypothetically throughout this case, does not receive the services of the Navigation District by virtue of his shipment contract with a railroad. The regular line-haul rate entitles the shipper only to transportation to the appropriate siding track. Independent arrangements must be made with the Navigation District and an additional charge paid in order to have the cars moved to the dumping mechanism and unloaded.
>
> . . . .

"The Navigation District makes no direct charge for the movement of rail cars incident to unloading. It charges one and one-half cents for the elevation of a bushel of grain. Though its costs, including the cost of moving rail cars, are included in this rate, the same charge is applicable whether the grain arrives by rail or motor carrier. . . ." (Emphasis added).

It is significant to note that Judge Gewin wrote approvingly of the district court's reliance on *Kelly v. General Electric Co.* in finding that the intraplant movement of goods by rail does not make a company a common carrier under the FELA.

Interestingly, *McCrea* was followed in *Sivils v. Harris County Houston Ship Channel Navigation District*, 462 S.W.2d 352 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ) on almost identical facts in which Brown & Haden again unsuccessfully tried to make the company a common carrier by railroad.

The Fifth Circuit in the recent case of *Mahfood v. Continental Grain Co., supra*, on almost identical facts to the instant case, made the same holding as the Texas state courts. The plaintiff, a Continental mechanic, was required as one of his duties to repair railroad locomotives owned by Continental. He was injured while working on a dump truck. Continental had several thousand feet of track within its grain export facilities and used two locomotives and a four-man crew to operate the railroad.

It had a lease agreement with the Missouri-Pacific Railroad Company, whereby the latter delivered railcars to Continental's grain export facilities and removed the cars after they were unloaded. Continental's engines were prohibited from leaving its premises except for a 1,500 foot segment of track owned by the Missouri-Pacific which was only used by Continental for storage. Pursuant to the lease, Continental constructed certain safety equipment and facilities for the part of the Missouri-Pacific line leased to Continental and, in turn, Continental was

to be reimbursed for such construction cost through revenue received for carloads hauled over that section of track.

The plaintiff contended, as does Petitioner in the instant case, that Continental's railroad was an integral part of the interstate rail operation whereby grain was carried by rail to export facilities and then to Continental wharfs for shipping by water to interstate destinations. Continental responded, just as Coffield does, that it was not a common carrier by rail because its railroad was used exclusively for its own purpose and no charges were made by reason of rail transportation, and it did not hold itself out for public hire or advertise its services. That court held that Continental was not a common carrier by rail and stated on page 782:

> "In conducting its business of shipping grain by sea from its grain facilities to other destinations, Continental undoubtedly performs some railroad functions. But this internal transportation of grain by Continental from the unloading station is not being performed as part of total rail services Missouri-Pacific (or Continental) has contracted with the public to perform. Nor is Continental's railroad operation an integral link of Missouri-Pacific's total rail operation. Finally, Continental does not receive either directly or indirectly remuneration for its rail services through fixed charges or through dividends from a subsidiary for which it fulfills rail services."

In addition, the court's response to the third consideration of *Lone Star* clearly answers petitioner's contention that Coffield is subject to the FELA. The court stated at page 783:

> "Finally, Mahfood urges us to hold that because Continental and Missouri-Pacific have entered into agreements with regard to the construction of safety equipment and switching track, the third prong of the *McGee* test is satisfied. We are not persuaded that a mere agreement as to track upkeep demonstrates that Continental is performing as a part of a 'system of

interstate rail transportation' as interpreted by *McGee* and its progeny. Indeed, the record does not reflect that 'the operations of the two are highly integrated and mutually dependent,' as was found in *McGee*. See *McGee, supra*, at 648."

In *Ciaccio v. New Orleans Public Belt Railroad*, 285 F. Supp. 373 (E.D. La. 1968), the question arose as to whether Lykes Brothers Steamship Company was an FELA common carrier by rail. Lykes, as a part of its steamship operations, maintained a stevedoring department to conduct the loading and unloading of vessels at the port of New Orleans. Some cargo were carried to and from the wharf by railcar which, in turn, were moved between the water ferry and staging points in New Orleans by the Public Belt Railroad Commission. Plaintiff, a Lykes employee, was injured while moving a railcar on the wharf. The court set out the distinction that Lykes did not hold itself out to the public as ready to transport goods for hire by rail on page 375:

"The small rail system of Lykes Brothers Steamship Company does not cause it to be a common carrier by railroad. It is true that Lykes carries goods belonging to others for their benefit and for hire. But Lykes does not hold itself out to the public as ready to transport goods for hire *by rail*. Lykes does advertise that it is willing to transport goods *by water* for the public indiscriminately, and therefore this company is a common carrier by water. But there is absolutely no advertising that Lykes carries freight by rail. Those who do not hold themselves out as willing to serve the public indiscriminately by railroad are not common carriers by railroad, and Lykes has never held itself out to the public as willing to perform such rail services. Rather, this rail system is merely the means by which Lykes has elected to facilitate the loading and unloading of its vessels and to move cargo on and off the wharf. It would be a distortion of FELA and the

Safety Appliance Act to include Lykes Brothers Steamship Company under their provisions as a common carrier by railroad." (Emphasis added).

The court discussed *Lone Star* on page 376:

"But surely, the modest rail system used by Lykes to load and unload its vessels cannot be compared to the vast rail complex operated by Lone Star Steel Company. . . ."

The court further indicated that Lykes did not have a common ownership or contractual relationship with any common carrier by rail.

Thurman v. Armco Steel Corp., C.A. No. H-79-1840 (S.D. Tex. Oct. 17, 1980) further illustrates that Coffield is not a common carrier by rail. Armco used approximately 100 employees to move goods and materials on its 75 miles of track with its locomotives and several railcars. In addition, it had separate contracts with the Port Terminal Railroad and Missouri Pacific for delivering and picking up railcars. Moreover, Armco moved railcars for Houston Slag Company, an independent company located within the Armco plant area, and charged Houston Slag $5.00 per car.

The court, however, noted:

". . . . The switching services performed by Armco are not part of Houston Slag's transportation contract with the commercial railroads, and payment is not made to the railroads for these services. Conversely, the railroads do not pay Armco for performing these services." (Tr. 653-54).

The Court applied *Lone Star* and held that, though Armco was a railroad and received remuneration, the rail service was not being performed as a part of the total rail service contracted for by a member of the public, and Armco was not performing as a part of a system of interstate rail transportation by virtue of common ownership between itself and the railroad or by

contractual relationship. The same is true in the instant case and, in addition, there is no remuneration to Coffield. If the court did not hold that Armco was providing services for the public in servicing Houston Slag, an independent company, surely Coffield, who only performed services for warehouse customers, is not performing for the public generally.

Substantial similarity exists between the facts of the instant case and those of *Mahfood, McCrea, Ciaccio*, and *Aho*. Coffield operates a warehousing business which is located near a port. Shipments arrive by rail and truck and leave by rail, truck and barge. Rail shipments are brought to Coffield by Southern Pacific. These cars are then moved short distances by Coffield employees, using Coffield equipment, incident to the unloading process at its facility. Coffield's operations include the unloading and storage of grain and other inanimate cargo. Coffield owns track and engines and employs people to operate this equipment. The maintenance of Coffield equipment is either done by Coffield employees or a private business, but not by Southern Pacific. All loading and unloading is accomplished by Coffield employees with Coffield equipment. Southern Pacific, as a common carrier, delivers and picks up railcars from a siding track within the Coffield premises.

Moreover, the services performed by Coffield are not a part of the total rail service contracted for by the public. The shipper does not receive the services of Coffield by virtue of shipment with Southern Pacific. The regular line-haul rate entitles the owner only to transportation to the appropriate siding. Coffield hauls goods to and from its siding in order to, and only to, benefit the company's warehousing service. Coffield does not move goods for the public generally, it only transports goods which a person has contracted to store with Coffield. Independent arrangements must be made with Coffield and an additional charge paid in order to have goods stored. Moving and unloading shipments is incidental to Coffield's storage operations.

Coffield does not shuttle the goods of any other company, nor does any other company maintain rail facilities within Coffield's premises. Coffield does not charge a fee for the movement of railcars incident to unloading. It charges a fixed rate for the elevation of grain or storage of freight, regardless of whether those goods arrive by rail or truck or leave by rail, truck or water. Coffield owns no stock or other financial interest in Southern Pacific, and receives no remuneration from that company. Under these facts, Coffield is clearly not a common carrier under the Fifth Circuit's test.

Petitioner attempts without success to conform these facts with the facts and law in *Lone Star*. Petitioner has made inaccurate conclusions from the evidence and alleges that the service Coffield performs is part of the total rail service contracted for by the public: *Lone Star* consideration two. Petitioner infers that Coffield uses its intraplant rail facility not as a means to facilitate its warehouse operations, but to carry for the public generally. This is simply not the fact.

Petitioner completely ignores the facts and the manner in which they interact with the well-established law. The contract with Coffield does not entitle the shipper to have the grain or goods moved by rail, truck or barge. The waybill will designate the rail carriers to be involved and will provide for division of revenue. Coffield will be shown as the consignee, not a rail carrier, and will not receive a division of the revenue. Coffield will store goods for the public generally but will not transport goods for the public generally.

Lone Star was delivering goods to other industries within its plant which T&N had contracted to do. Further, Lone Star received compensation for taking goods to these other industries through T&N's stock dividends. Thus, Lone Star performed part of the rail service which T&N had contracted with the public to do and since it received compensation for making those rail movements, it was held to be a common carrier by railroad.

Coffield does not perform any aspect of the services which Southern Pacific has contracted to do. Furthermore, independent arrangements must be made with Coffield and an additional charge paid in order to have the railcars, which Southern Pacific brings to the Coffield siding, moved and unloaded. *Cf. McCrea*, 423 F.2d at 609. Unlike Lone Star, Coffield is not holding itself out to the public as willing to haul the goods of other industries, companies, or individuals. Coffield only moves and unloads goods to facilitate its warehouse business and exclusively for its warehouse customers. Therefore, considerations two and three of Lone Star are not met under these facts.

CONCLUSION

The decisions of the trial court, the court of appeals, and the Supreme Court of Texas correctly interpret and apply 45 U.S.C. § 51 under the precedent of this Court, and of the United States Courts of Appeals, and of the district courts which have considered this issue. Such an approach is consistent with the judicial obligation to interpret and apply a federal statute so as to effectuate its purpose. This is precisely what was done in the instant case by the courts below. Further, as stated in *Wells Fargo v. Taylor* and *Edwards v. Pacific Fruit Express Co.*, this Court is guided by Congress' intent when construing the scope of the FELA which intent has not changed in over sixty years. The relief that Petitioner seeks falls outside of the scope of the remedy granted by the United States Congress in the FELA. The decisions of the 157th Judicial District Court of Harris County, Texas, the Court of Appeals for the Sixth Supreme Judicial District of Texas, and the Supreme Court of the State of Texas are correct.

WHEREFORE, PREMISES CONSIDERED, respondent, Estate of H. H. Coffield, Deceased, and Estate of Charles H. Coffield, Deceased, doing business as Coffield Warehouse

Company, respectfully requests that the Petition for Writ of Certiorari should be denied. Respondent further requests all other relief to which it may be entitled.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for Respondent was served upon Mr. J. L. Hinojosa, Two Houston Center, Suite 1450, 909 Fannin Street, Houston, Texas 77010-1006, attorney for Petitioner, by mailing three (3) copies of same to him via the United States mail, first class, postage prepaid, on this the 1st day of July, 1985, and that he is the attorney for the only other party to be served in this matter.

_____
Arno W. Krebs, Jr.